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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1969

No. 185

AUGIE REETZ, Commissioner of Fish and Game for Alaska, et al.,
Appellants,

vs.

JOHN BOZANICH, et al.,
Appellees.

Appeal from the United States District Court for the District of Alaska

Filed May 31, 1969
Probable Jurisdiction Dated October 13, 1969

Index to Appendix

	Page
Plaintiffs' Amended Complaint	1
Defendants' Answer to Amended Complaint	21
Affidavit of Rudolph Plancich in support of Plaintiffs' motion for preliminary injunction	24
Defendants' Motion to Dismiss or in the alternative to stay proceedings	28
Defendants' Motion for Summary Judgment and suggestion of mootness	29
Affidavit of Augie Reetz	30
Plaintiffs' Motion for Summary Judgment, without exhibits	32
Letter of former Attorney General Edgar Paul Boyko dated 2/9/68 (with copies of regulations attached)	38
Letter of Edgar Paul Boyko dated 2/16/68	52
Interrogatories propounded to Defendants	53
Defendants' answer to Interrogatories	55
Plaintiffs' notice of renewal of Motion for Preliminary Injunction	58
Supplemental affidavit of Rudolph Plancich	60
Affidavit of Robert Boochever	62
Opinion	65
Decree	78
Selected Additional Alaska Commercial Fishing Regulations and Statutes	80

DOCKET ENTRIES

Document	Entry
Plaintiffs' Amended Complaint	Filed February 14, 1969
Defendants' Answer to Amended Complaint	Filed February 14, 1969
Affidavit of Rudolph Plancich in support of Plaintiffs' motion for preliminary injunction	Filed July 11, 1968
Defendants' Motion to Dismiss or in the alternative to stay proceedings	Filed September 16, 1968
Defendants' Motion for Summary Judgment and suggestion of mootness	Filed November 6, 1968
Affidavit of Augie Reetz	Filed November 6, 1968
Plaintiffs' Motion for Summary Judgment, without exhibits	Filed December 2, 1968
Letter of former Attorney General Edgar Paul Boyko dated 2/16/68 (with copies of regulations attached)	Filed December 2, 1968
Letter of Edgar Paul Boyko dated 2/16/68	Appellants' Opposition to Appellees' Motion to dismiss and/or affirm
Interrogatories propounded to Defendants	Filed January 6, 1969
Defendants' answer to interrogatories	Filed January 20, 1969
Plaintiffs' notice of renewal of Motion for Preliminary Injunction	Filed January 20, 1969
Affidavit of Robert Boochever	Filed January 20, 1969
Opinion	Filed February 26, 1969
Decree	Filed March 20, 1969
Selected Additional Alaska Commercial Fishing Regulations and Statutes	Appellees' Motion to Dismiss and/or affirm

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Appendix

DOCUMENTS

United States District Court for the
District of Alaska
Juneau, Alaska

John Bozanich, Andy Ness, Rudolph Plancich, Alan Takalo and William White, Plaintiffs, vs. Augie Reetz, Commissioner of Fish and Game for the State of Alaska; Robert Moss, Chairman; and Mike Uttecht, Harry A. Shawback, Frank Cook, Don Harris, Don Smith, Glenn DeSpain, J. Ellsworth Jensen and Gordon Jensen, Members of the Board of Fish and Game for the State of Alaska, Defendants.	No. J-5-68

AMENDED COMPLAINT

Come Now the above-named plaintiffs, and for their cause of action against the defendants, allege as follows:

1. This is an action for a declaratory judgment under 28 U.S.C. Section 2201, declaring unconstitutional that portion of the 1969 Commercial Fishing

Regulations for the State of Alaska designated Section 102.09 and entitled "Salmon Net Gear Licenses," and further declaring unconstitutional Sections 16.05.536, 16.05.540 and 16.05.250 of Alaska Statutes, as amended by Chapter 186, Laws of Alaska, 1968, in that said regulations are in contravention of the Constitution and Fourteenth Amendment to the Constitution of the United States of America and in contravention of the Constitution of the State of Alaska. This action is further for injunctive relief against the enforcement and application of the aforesaid regulations and statutes on the ground of their unconstitutionality and a hearing by a District Court of three judges pursuant to the requirements of 28 U.S.C. §2281 is hereby requested. The matter in controversy exceeds the sum of $10,000 and jurisdiction is based on 28 U.S.C. §§1331 and 1332.

2. Each of the plaintiffs has been engaged at various times in the past as a commercial fisherman for salmon in the waters of the State or the Territory of Alaska. None of the plaintiffs is a resident of the State of Alaska. On or prior to April 15, 1968, John Bozanich and William White applied for a 1968 license authorizing their operation of their own salmon net gear for the Bristol Bay fishing area; Andy Ness and Rudolph Plancich during the same period applied for such a license for operation in the Southeastern fishing area of Alaska, and Alan Takalo during the same period applied for such a license for the Cook Inlet fishing area of the State of Alaska.

3. The defendant, Augie Reetz, is now and was at all times material, the Commissioner of the Fish and

Game Department of the State of Alaska, is responsible for the enforcement of the laws and regulations applicable thereto and, unless restrained from so doing, will enforce the provisions thereof including those more fully described in paragraph 1 of this amended complaint. The remaining defendants are members of the Alaska Board of Fish and Game, and unless the illegality thereof is declared in this suit, will continue to adopt and direct the enforcement of regulations granting special, exclusive and monoply fishing rights. All of the defendants are residents of the State of Alaska.

4. That in February, 1968, the Alaska Board of Fish and Game purported to adopt an amendment to the regulations for commercial fishing in Alaska, designated Part 102.09 and entitled, "Salmon Net Gear License Eligibility," a copy of which is attached hereto and incorporated herein by this reference as Exhibit "A". The aforesaid regulations restricted the issuance of salmon net gear licenses in each registration area to certain persons only who fall within the qualifying conditions set forth in the regulations. Each of the plaintiffs was denied a gear license in the area of his choice for failure to qualify under these requirements. The plaintiffs' names were thereafter deposited with other gear license applicants, whose applications had been denied, for participation in the conduct of a public drawing for the selection of a certain number of additional licensees for each registration area under the provisions of subsection (3) of §102.09 of the regulations of 1968. Such a drawing was held at Juneau, Alaska, on May 9, 1968, at which

drawing approximately 146 applicants were selected for the granting of net gear licenses in the areas of their choice from a total of approximately 315 applicants. The applications of the approximately 169 persons whose names were not selected at the drawing were again denied, including the application of each of the plaintiffs.

5. That in December, 1968, the Alaska Board of Fish and Game purported to adopt a further amendment to the regulations for commercial fishing in Alaska, designated Part 102.09 and entitled, "Salmon Net Gear Licenses," a copy of which is attached hereto and incorporated herein by this reference as Exhibit "B". The aforesaid regulations restrict the issuance of salmon net gear licenses in each registration area to certain persons only, who fall within the qualifying conditions set forth in the regulations. Each of the plaintiffs intend to file applications for gear licenses for the year 1969, similar to the applications filed by them in 1968. Since the 1969 regulations are more restrictive than those of 1968 the plaintiffs cannot qualify for such licenses. Moreover, the public drawing provisions of the 1968 regulations have been eliminated so that the plaintiffs have been deprived of any opportunity of obtaining such licenses for the year 1969.

6. In April, 1968, the legislature of the State of Alaska enacted Chapter 186, Laws of Alaska, 1968, as an amendment to Alaska Statute Section 16.05.536, entitled "Persons Eligible for Gear Licenses," Section 16.05.540, entitled "Limitation on Issuance of Fishing

Gear Licenses" and Section 16.05.250 adding to the authority of the Alaska Board of Fish and Game to establish additional qualifications relating to the eligibility requirements for gear licenses. A copy of this statute is attached hereto and incorporated herein by this reference, as Exhibit "C".

7. The adoption and enforcement of Section 102.09 of the 1969 Alaska Commercial Fishing Regulations which grant some fishermen the right to fish with their own gear in a requested area and deny the same right to other applicants on the sole basis of whether the applicant fished that particular area within specified prior years is violative of and in contravention of the following provision of the Alaska Constitution, to wit:

> "Article VIII, Section 15:
>
> "*No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The subject regulations are also violative and in contravention of the following other provisions of the Alaska Constitution, to wit:

> "Article I, Section 1:
>
> "*Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have cor-

responding obligations to the people and to the State."

"Article I, Section 7:

"*Due Process.* No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

"Article VIII, Section 3:

"*Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

"Article VIII, Section 17:

"*Uniform Application.* Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

As such, the aforesaid regulations constitute a deprivation of the equal protection of the laws, abridge the privileges and immunities of citizens of the United States, and deprive persons of their property without due process of law, as prohibited by Section 1 of Article XIV of the Amendments to the Constitution of the United States of America, by granting fishing rights to some and denying such rights to others who under these laws are equally entitled thereto. That such regulations constitute a violation of the Fourteenth Amendment and constitute a prohibited impairment of inter-state commerce in violation of Article I, Section 8, Clause 3 of the United

States Constitution even without regard to the provision of the Alaska Constitution because there is no reasonable basis for the classification made regarding entitlement and there is no reasonable basis for the discrimination on the fortuitous events described under subsection (2) entitled "Exception for Extreme Hardship" of Section 102.09. In addition, under subsection (B) of subsection (2), entitled "Other Cases of Extreme Hardship", there is an unlawful delegation of legislative authority to a "Hardship Panel" to determine under what "other cases of extreme hardship" a gear license will be granted, without a sufficient standard prescribed.

8. The adoption of the regulations was beyond the power and authority of the Alaska Board of Fish and Game, the extent of which authority is set forth under Alaska Statute Section 16.05.250. No portion of either this or any other Alaska statute either directly or by inference authorizes the restriction on fishing entitlement as promulgated under Section 102.90. The regulations were further adopted in violation of the requirements of Section 44.62 of Alaska Statutes governing the procedure which must be followed in the adoption of regulations by State administrative agencies.

9. The provisions of Chapter 186 of the Laws of Alaska, 1968, amending Section 16.05 of Alaska Statutes as hereinbefore alleged and specifically providing under Section 5 thereof:

> "This Act becomes effective on January 1, 1969, unless all or any part of Sec. 102.09 of the 1968

> Alaska Commercial Fishing Regulations are struck down by the courts, at which time this Act will become effective immediately."

are also and equally in contravention of the aforequoted provisions of the Alaska Constitution, to wit, Article I, Sections 1 and 7, and Article VIII, Sections 3, 15, and 17 and of Article I, Section 8, Clause 3 and the Fourteenth Amendment, Section 1 of the United States Constitution in that a right to fishing gear licenses would be denied some applicants equally entitled thereto under the existing law, and an absolute monopoly of gear licenses is granted to those previously licensed in the same area, or who have fished commercially in that area for someone else for three years. A special and exclusive right of fishery is thereby granted on the sole basis of prior entitlement or employment by someone else who has prior entitlement. The statute further unlawfully grants the Board of Fish and Game authority to make exceptions in cases of "extreme hardship as defined by the Board of Fish and Game" under Section 2 of the Act and authority to "establish additional qualifications" under Section 4 of the Act without prescribing a sufficient or adequate legislative standard for making the administrative determinations provided.

10. That since the enactment of the White Act in 1924, 43 Stat. 464, Ch. 272, until the present season, all persons applying for a gear license were granted one each year in the area of their choice, unless disqualified by reason of their own misconduct. Such

selections could be made in the past to co-ordinate the fishing effort to the anticipated runs without jeopardy of loss of future fishing privileges. All persons enjoyed an equal right of fishery as a common calling in all areas where fishing was permitted. The right to operate or utilize one's own gear in the area of his choice is a valuable right representing potential earnings ranging in varying seasons from share of $500 to $20,000 each. In the Southeastern Alaska fishing area, the owner and licensee of a salmon purse seine, the use of which would require a gear license as herein described, would receive 3 shares, estimated for large runs to be valued at approximately $7,000 per share, or a total value of $21,000 lost to an unsuccessful gear applicant. Continuation of the regulations and statutes, the constitutionality of which is sought to be adjudicated in this proceeding, would result in a recurrence of these losses in future years. The total amount of such losses cannot be estimated, but would far exceed $10,000 for each of the plaintiffs. The loss and damage from the application of these statutes in the denial of a license for the operation of salmon fishing gear results in the irreparable loss and damage above described, for which loss and damage there is no plain, adequate or speedy remedy at law. Utilization of such gear without the required license would result in criminal prosecution and possible confiscation of fishing vessels and equipment, unless such proceedings were restrained in this cause, and would in any event result in a multiplicity of suits.

Wherefore, the plaintiffs pray as follows:

(1) That a three-judge District Court be convened to hear and determine this cause pursuant to the authority and requirements of 22 U.S.C. §§2281 and 2284.

(2) That a temporary restraining order be entered herein restraining the prosecution of these plaintiffs or any other member of the class represented by said plaintiffs, because of the utilization of salmon fishing gear without a license where the sole reason for denying the license is the application of Chapter 186 of the Laws of Alaska, 1968 and/or Section 102.09 of the 1969 Alaska Commercial Fishing Regulations; or in the alternative, requiring the issuance of such licenses to the plaintiff applicants subject to revocation by further order of this court.

(3) That judgment be entered declaring that Part 102.09 of the 1969 Alaska Commercial Salmon Fishing Regulations and Chapter 186 of the Laws of Alaska, 1968, are unconstitutional, null, void and invalid.

(4) That judgment be entered permanently enjoining and restraining the defendants, their successors in office and all persons acting as their agents, officers and servants or under their direction or authority from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the 1969 Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Laws of Alaska, 1968, and from denying fishing gear licenses by reason of the authority thereof.

(5) For such other relief as to the court may seem proper.

Dated this 6th day of January, 1969.

Allen, DeGarmo & Leedy
and Seth W. Morrison
Faulkner, Banfield, Boochever & Doogan
By /s/ R. Boochever
R. Boochever
of Attorneys for Plaintiffs.

Copy received
January , 1969
(signature illegible)
of Attorneys for Defendants.

Exhibit "A"

GENERAL PROVISIONS

(1) It shall be unlawful to use or operate a drum or reel around which a seine is coiled or rolled.

(2) It shall be unlawful to have mounted aboard any seining vessel such seine drum or reel.

(3) This section does not prevent the use of power blocks or the use of a real mounted on a seine skiff to haul in or let out the separate purse seine lead which is temporarily connected to the purse seine proper as these terms are generally employed or used in the fishing industry.

(g) Maximum length of salmon seine vessels.

No salmon seine vessel shall be longer than 50 feet, official register length, and 58 feet overall length except vessels that have fished salmon with seines in waters of Alaska prior to January 1, 1962, as 50 foot, official register length vessels.

(h) It shall be unlawful to use single or multiple strand monofilament purse seine web.

For the purpose of this regulation, "monofilament" means any single filament having more than 50 denier, that is, weighing more than 50 grams per nine thousand meters of filament.

(i) Time limit for preservation of salmon.

It shall be unlawful to preserve for sale as food any salmon unless it shall have been canned, salted, iced,

frozen, brine chilled, smoked, or dried within 48 hours after being killed.

(j) Driving salmon downstream is prohibited.

The driving of salmon downstream or the causing of salmon to go outside the protected area at the mouth of any stream is prohibited.

SALMON FISHERY

102.09 Salmon Net Gear Licenses.[2]

The following regulations regarding Alaska salmon net gear licenses apply to all Salmon Registration Areas listed in Sec. 102.1 (b) (4).

(a) Salmon net gear license eligibility.

An individual applying for a 1968 salmon net gear license for a given Salmon Registration Area shall be issued a salmon net gear license for that area only under the following conditions:

(1) Prior licensing: When the applicant licensed salmon net gear in that Salmon Registration Area in 1965, 1966 or 1967. In the event the applicant licensed salmon net gear in different Alaska Salmon Registration Areas in 1965, 1966 or 1967, he may select any Salmon Registration Area for which he held an Alaska salmon net gear license for those years.

(2) Hardship:

(A) Military Service: If a person held an Alaska salmon net gear license before January 1, 1965 and due to service in the Armed Forces of the United States was precluded from purchasing an Alaska salmon net gear license for

1965, 1966 and 1967, he shall be issued a 1968 salmon net gear license upon application.

(B) Investment in vessels: A person who made a commitment between April 16, 1966 and December 16, 1967 for the purchase or construction of a salmon net vessel to be used in an Alaska salmon net fishery will be issued a 1968 salmon net gear license, if either of the following conditions are met:

(I) The salmon net vessel purchased was larger than 16 feet and evidence of purchase, such as a copy of bill of sale, copy of a cancelled check, or affidavits by both the buyer and seller, is furnished to the Commissioner.

(II) In the case of vessels being built, or modified, the keel has been laid and/or an investment has been made for material in excess of $200, and evidence of construction, such as a copy of a contract with a boatyard, or copies of cancelled checks or a bill of sale for material, is furnished to the Commissioner.

(C) Investment in Gear: A person who made an investment between April 16, 1967 and December 16, 1967 of at least $200 in salmon net gear to be used by the purchaser in an Alaska salmon net fishery will be issued a 1968 salmon net gear license upon submission to the Commissioner of evidence of purchase, such as a copy of a bill of sale, copy of a cancelled check, or affidavits by both buyer and seller.

(D) Sickness and/or Death: A 1968 salmon net gear license shall be issued to a person who held an Alaska salmon net gear license before 1965 and who can present evidence in

the form of a doctor's statement or affidavits from knowledgeable persons, of illness which incapacitated him for 1965, 1966 and 1967. If a head of a household, who held a 1965, 1966, or 1967 Alaska salmon net gear license, is prevented from fishing in 1968 because of medical reasons or death, a member of his family shall be issue a 1968 salmon net gear license. The family member to be licensed shall be selected by the family in question.

(E) New and developing fisheries: The Commissioner shall authorize the issuance of 1968 salmon net gear licenses for new and developing salmon net fisheries only under the following conditions:

(I) The new and developing salmon net fisheries are west of Umnak Island in Salmon Registration Area M, or in Salmon Registration Areas W, X, Y and Z, and

(II) The issuance of such licenses is necessary to enable the harvest of salmon from new and developing fisheries.

(F) Change of Domicile within Alaska: An individual who is eligible for a 1968 salmon net gear license for a given Salmon Registration Area under Sec. 102.09 (a) (1) will be granted a salmon net gear registration for a different Salmon Registration Area if he changed his domicile to that area after April 15, 1967, and he waives his right to be registered for the other Salmon Registration Area.

Exhibit "B"

EXTRACT FROM 1969 COMMERCIAL FISHING REGULATIONS FOR THE STATE OF ALASKA

Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear licenses for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:

Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;

If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certi-

fied by a physician, or death, a member of his family, or other individual selected by the family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a location where eligible fishermen are insufficient to adequately harvest the resource.

Exhibit "C"

LAWS OF ALASKA

(Seal)

1968

Source	Chapter No.
FCCSSB 327	186

AN ACT

Relating to persons eligible to obtain gear licenses; and providing for an effective date.

Be Is Enacted by the Legislature of the State of Alaska:

* Section 1. LEGISLATIVE FINDINGS. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature

to impose experience requirements before issuance of salmon gear licenses to applicants.

* Sec. 2. AS 16.05 is amended by adding a new section to read:

Sec. 16.05.536. PERSONS ELIGIBLE FOR GEAR LICENSES. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the ap-

plicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affidavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

* Sec. 3. AS 16.05.540 is amended to read:

Sec. 16.05.540. LIMITATION ON ISSUANCE OF FISHING GEAR LICENSES. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

* Sec. 4. AS 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

* Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968

Actual effective date: January 1, 1969

[Title of Court and Cause]

ANSWER TO AMENDED COMPLAINT

Come Now the defendants in the above entitled suit, by and through their duly authorized counsel, G. Kent Edwards, Attorney General for the State of Alaska, and in answer to plaintiffs' amended complaint admit, deny and allege as follows:

I

The defendants admit that the plaintiffs are seeking injunctive relief and a declaratory judgment. The defendants deny each and every other allegation contained in paragraph 1 of the amended complaint.

II

The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the amended complaint and do, therefore, deny each and every allegation contained in paragraph 2 of the amended complaint.

III

The defendants admit that Mr. Augie Reetz is the Commissioner of the Fish and Game Department of the State of Alaska and is responsible for the enforcement of the laws and regulations applicable thereto. The remaining defendants also admit that they are members of the Alaska Board of Fish and Game. The defendants admit that they are residents of the State of Alaska. The defendants deny each and every other allegation of paragraph 3 of the amended complaint.

IV

The defendants admit the allegations contained in paragraph 4 of the amended complaint except for that

portion of paragraph 4 wherein plaintiffs state that the Alaska Board of Fish and Game "purported" to adopt an amendment to the regulations. Defendants state specifically that the Alaska Board of Fish and Game did, in fact, adopt an amendment to the regulations.

V

In respect to the allegations contained in paragraph 5 of the amended complaint defendants state that in December 1968 the Alaska Board of Fish and Game considered the adoption of amendments to the regulations for commercial fishing in Alaska. Such amendments have not been adopted, nor can they be prior to the meeting of February 8 of the Alaska Board of Fish and Game and cannot be effective until thirty days thereafter. As to the remainder of paragraph 5 defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5, and do, therefore, deny each and every remaining allegation contained therein.

VI

The defendants admit the allegations contained in paragraph 6 of the amended complaint.

VII

The defendants deny each and every allegation of paragraph 7 of the amended complaint.

VIII

The defendants deny each and every allegation of paragraph 8. Further, defendants allege that insofar

as paragraph 8 applies to the proposed 1969 commercial salmon fishing regulations, such regulations have not yet been adopted by the defendants, nor can they be prior to February 9, 1969.

IX

The defendants deny each and every allegation of paragraph 9 of the amended complaint.

X

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the amended complaint, except that the defendants admit that fishing without the required licenses could result in criminal prosecution and possible confiscation of fishing vessel and equipment, and do, therefore, deny each and every allegation of paragraph 10 of the amended complaint except as aforementioned.

Wherefore, the defendants pray that the amended complaint in this matter be dismissed and the relief asked for be denied; that defendants be awarded reasonable costs and attorney fees incurred in defending the action herein; and for such other relief as the Court may deem just and proper.

Dated at Juneau, Alaska, this 15th day of January, 1969.

G. Kent Edwards
Attorney General

By: /s/ Robert J. Mahoney
Robert J. Mahoney
Assistant Attorney General

[Title of Court and Cause]

AFFIDAVIT OF RUDOLPH PLANCICH

State of Washington
County of King—ss.

Rudolph Plancich, being first duly sworn, on oath, deposes and says:

That he is now and has been since 1920 a commercial fisherman. That he is an American citizen. That he has fished as a commercial fisherman for salmon in Alaska waters since 1936, although some years in between he fished in Puget Sound waters when poor Alaska runs were predicted.

That in 1960, he built the gill net vessel "ST. TERESA" and fished in Bristol Bay as a gill net fisherman on this vessel from 1960 through 1966. Because of a back injury, he did not fish in Bristol Bay in 1967.

In 1964, he built the purse seine vessel "ST. MARY II" which fished in Southeastern Alaska in 1964 and 1965 with a crew supplied by the Nakat Packing Corporation, and in 1966 the vessel was licensed in Kodiak in connection with a sale of the vessel which was not consummated. In 1967, because a poor run in Southeastern Alaska was predicted, the vessel "ST. MARY II" fished in Puget Sound.

In 1968, it is anticipated that there will be a very small run of salmon in Bristol Bay, but it is also predicted that there will be a very large run of salmon in the Southeastern District of Alaska, estimated to involve as many as 22 million fish. There is concern that there may not be a sufficient fishing

effort in Southeastern Alaska to effectively harvest a sufficient portion of the run to avoid excessive and wasteful escapement.

In view of the predictions, Affiant applied to the Alaska Department of Fish and Game for a gear license to fish in the Southeastern District instead of Bristol Bay for the 1968 season. Notwithstanding the economic and conservation factors which show that the fishing effort should be concentrated in Southeastern Alaska and minimized in Bristol Bay, the Alaska Fish and Game Department refused Affiant's application in a letter dated April 8, 1968 and attached to this affidavit as Exhibit 1, which refusal was based on the requirements and provisions of Section 102.09 of the Alaska Commercial Fishing Regulations adopted for 1968. Affiant's name was placed in the drawing scheduled to be conducted pursuant to the provisions of Section 102.09(3)(D) of the regulations. This drawing was actually held on May 9, 1968 at the offices of the Department of Fish and Game for the State of Alaska, but Affiant's name was not drawn. He was therefore denied a license for Southeastern Alaska, as appears from the letter of May 13, 1968 from Mr. Augie Reetz, a Commissioner of the Alaska Department of Fish and Game, which letter is attached to this affidavit and marked Exhibit 2. Unless Affiant receives judicial relief, he will be prohibited from participating in the Southeastern District salmon fishery for 1968.

Affiant estimates that if he fishes in Bristol Bay in 1968, his earnings will be approximately $200 to $500 after expenses for the entire season. On the

other hand, if he were able to fish in Southeastern Alaska, his earnings for one share as a crew member, based on past actual earnings in good years, would be approximately $6,000 to $7,000, and could well be even more. In addition, the delay arising from the processing of his application and the final refusal which was not confirmed until May 13 has made it very unlikely that he will be able to obtain a competent and qualified captain for the vessel and assemble a competent crew. The vessel receives two shares of the total catch under the customary arrangement, and if Affiant is unable to fish it or have it fished, he will lose an additional $14,000. The vessel represents an investment of approximately $45,000 and particularly in this year of restricted licensing and the great demand for competent vessel captains and crewmen, the likelihood of obtaining a competent crew is very remote. The risk of navigation and fishing is such and the investment is so great that much care must be exercised in selecting an appropriate crew.

The loss and damage which Affiant will suffer in 1968 if not permitted to fish in Southeastern Alaska will beyond doubt occur in future years if the same or similar regulations are again promulgated or if comparable statutory provisions continue in effect, but the amount of such loss cannot be estimated. Affiant has no means of recovering this loss for the year 1968 or the loss in future years and no adequate remedy at law.

In 1967, but prior to April 16, Affiant invested slightly over $1,000 in purchasing salmon net gear to

be used in Southeastern Alaska. Although this showing was made to the Department of Fish and Game, the application was nevertheless denied presumably under the time limitations set forth in 102.09(1)(C). Affiant is aware of other applicants who made the minimum $200 investment after April 16, 1967 and who were granted licenses to fish in Southeastern Alaska for 1968, notwithstanding the fact that these applicants had never before been to the State of Alaska for fishing.

/s/ Rudolph Plancich
Rudolph Plancich

Subscribed and sworn to before me this 25th day of May, 1968.

/s/ Seth W. Morrison
Notary Public in and for the State of Washington, residing at Seattle.

[Title of Court and Cause]

MOTION TO DISMISS ACTION

(Or in the Alternative to Stay Proceedings)

The Defendants move the court as follows:

To dismiss the action, or in lieu thereof to say proceedings herein, on the following grounds:

(a) That Plaintiffs may have an adequate, speedy and complete determination of the controversy in the Superior Court of the State of Alaska;

(b) That the within case involves the construction of a state constitution and state statute and regulations;

(c) That determination of the state issues by a State Court may remove all Federal issues.

Dated this 16th day of September, 1968, at Juneau, Alaska.

G. Kent Edwards
Attorney General

By /s/ Robert J. Mahoney
Robert J. Mahoney
Assistant Attorney General
Attorney for Defendants

[Title of Court and Cause]

MOTION FOR SUMMARY JUDGMENT, AND SUGGESTION OF MOOTNESS

Pursuant to Rules of Civil Procedure 56, defendant Augie Reetz, Commissioner of Fish and Game for the State of Alaska, and all other defendants herein move the Court to enter summary judgment in favor of defendants on the following grounds:

1. Section 102.09 of the Commercial Fishing Regulations of the State of Alaska, are no longer of any force and effect, both as to these plaintiffs, and as to any person applying for commercial salmon net gear licenses in the State of Alaska or elsewhere.

2. The plaintiffs herein have never applied for, and consequently have never been denied salmon net gear licenses under the provisions of Chapter 186, SLA 1968. Hence there is no actual controversy between the parties as to that chapter.

3. There is no genuine issue as to any material fact herein and that defendants are entitled to judgment as a matter of law.

This motion is based upon:

1. Defendants' memorandum.

2. The files and records of this case.

3. Supporting affidavit of Augie Reetz, Commissioner of Fish and Game of the State of Alaska.

Dated at Juneau, Alaska, this 6th day of November, 1968.

G. Kent Edwards
Attorney General

By: /s/ Robert J. Mahoney
Robert J. Mahoney
Assistant Attorney General

[Title of Court and Cause]

AFFIDAVIT IN SUPPORT OF MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

State of Alaska—ss.

First Judicial District

Augie Reetz, being first sworn, deposes and says:

(1) That he is the duly appointed Commissioner of the Department of Fish and Game, State of Alaska.

(2) The 1968 commercial fishing regulations are no longer in effect as to their application to salmon net gear licensing due to the fact that there is no salmon net gear fishery operating within the state during this period. Salmon are not now available to salmon net gear and the season has been closed for the calendar year 1968.

(3) The 1968 regulations concerning eligibility for salmon net gear licensing do not apply to any other year. No application for salmon net gear licenses can now be considered due to the April 15, 1968 deadline on such licenses. Regulations concerning eligibility for salmon net gear licensing in 1969 will be adopted by the Board of Fish and Game at their fall meeting in 1968.

(4) No applications are being accepted for salmon net gear licenses for 1969 since the regulations governing such issuance have not been promulgated. No applicants have been denied a salmon net gear license as of this date nor have any licenses been issued.

Applications for 1969 salmon net gear licenses will be accepted after the 1969 regulations are in effect. The regulations usually become effective in early February.

/s/ Augie Reetz
Augie Reetz
Commissioner of Fish and Game

Subscribed and sworn to before me this 5th day of November, 1968.

/s/ Florence K. Floreske
Notary Public, State of Alaska.
My commission expires May 15, 1971.

[Title of Court and Cause]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Come Now the above named Plaintiffs through their attorneys of record and move the Court for entry of a summary judgment pursuant to Civil Rule No. 56 declaring Chapter 186 of the 1968 Session Laws of the State of Alaska and Regulation Section 102.09 of the 1968 Commercial Fishing Regulations for the State of Alaska unconstitutional and void.

1. There is attached to and made a part of this motion (designated Exhibit A) a true copy of Section 102.09 entitled "Salmon Net Gear Licenses" of the Commercial Fishing Regulations of the State of Alaska for 1968, and (designated Exhibit B) Chapter 186 of the 1968 Session Laws amending Sections 16.05.536, 16.05.540 and 16.05.250 of Alaska Statutes.

2. The Defendants have admitted in paragraphs III, IV and V the following allegations of the Complaint, to-wit:

Paragraph III of the Answer:

> "The defendants admit that Mr. Augie Reetz is the Commissioner of the Fish and Game Department of the State of Alaska and is responsible for the enforcement of the laws and regulations applicable thereto. The remaining defendants also admit that they are members of the Alaska Board of Fish and Game. The defendants admit that they are residents of the State of Alaska. . . ."

Paragraph 4 of the Complaint:

> "That in February, 1968, the Alaska Board of Fish and Game purported to adopt an amend-

ment to the regulations for commercial fishing in Alaska, designated Part 102.09 and entitled, 'Salmon Net Gear License Eligibility,' a copy of which is attached hereto and incorporated herein by this reference as Exhibit A. The aforesaid regulations restrict the issuance of salmon net gear licenses in each registration area to only certain persons who fall within the qualifying conditions set forth in the regulations. Each of the plaintiffs was denied a gear license in the area of his choice for failure to qualify under these requirements. The plaintiffs' names were thereafter deposited with other gear license applicants, whose applications had been denied, for participation in the conduct of a public drawing for the selection of a certain number of additional licenses for each registration area under the provisions of subsection (3) of Section 102.9 of the regulations. Such a drawing was held at Juneau, Alaska, on May 9, 1968, at which drawing approximately 146 applicants were selected for the granting of net gear licenses in the areas of their choice from a total of approximately 315 applicants. The applications of the approximately 169 persons whose names were not selected at the drawing were again denied, including the application of each of the plaintiffs."

except that defendants denied that the Alaska Board of Fish and Game "purported" to adopt Section 102.09 as alleged, and asserted that defendants did, in fact, adopt said Section.

Paragraph 5 of the Complaint:

"In April, 1968, the legislature of the State of Alaska enacted Chapter 186 Laws of Alaska 1968 as an Amendment to Alaska Statute Section 16.-

05.536 entitled 'Persons Eligible for Gear Licenses,' Section 16.05.540, entitled 'Limitation on Issuance of Fishing Gear Licenses' and Section 16.05.250 adding to the authority of the Alaska Board of Fish and Game to establish additional qualifications relating to the eligibility requirements for gear licenses. . . ."

3. The aforesaid regulations and statute are invalid as being in contravention of Article I, Section 8, Clause 3 of the United States Constitution and the Fourteenth Amendment, Section 1, to said United States Constitution, to-wit:

Article I

"§8. Powers of Congress. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

* * *

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

Amendment XIV

"§1. Citizenship rights not to be *abridged by states.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Said conflict appears from the clear language of the regulations and statute without the necessity of resorting to further facts and circumstances requiring a trial.

4. The aforesaid Statute and regulations, and each of them, are also invalid as being in conflict with certain provisions of the Constitution of the State of Alaska. Said conflict appears from the language of the regulations and the statute, without the necessity of resorting to further facts and circumstances requiring a trial. The principal provision of the Alaska constitution invalidating the above designated statute and regulations is Article VIII, Section 15, which provides:

"Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

The regulations and statute are also invalid as in conflict with the following additional provisions of the Alaska constitution:

Article I

Section 1. *Inherent Rights.* This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons

have corresponding obligations to the people and to the State."

"Section 7. *Due Process.* No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

Article VIII

"Section 3. Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

"Section 17. Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."

5. (a) The provisions of Article VIII, Section 15 of the Alaska constitution were taken nearly verbatim from Section 1 of the White Act, as amended, (48 U.S.C. §221, 222) which has been held in *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 93 L ed 1231, to prohibit the limitation of fishing rights to any special group or number of people. A group composed of those who have been previously licensed as described in Chapter 198 and Regulation Section 102.09 constitutes such a "special group."

(b) The provisions of Article I, Section 1 and 7 of the Alaska constitution have been held to prohibit discrimination in fishing rights based on residency in the case of *Brown v. Anderson* (Alas. 1962) 202 F. Supp. 96 (three judge court). The same provisions

are equally applicable under said authority to prohibit discrimination based on prior licensing in a specified fishing area.

(c) A provision in the constitution of the State of Washington substantially equivalent to Article I, Section 1; Article VIII, Section 3; Article VIII, Section 15 and Article VIII, Section 17 of the Alaska Constitution and the Fourteenth Amendment to the United States Constitution was held to prohibit legislation which would have limited entitlement to fishing licenses to those persons who had been issued licenses for the prior two years in the case of *State Ex Rel. Bacich v. Huse,* 186 Wash. 75, 59 P.2d 1101.

(d) The foregoing case authorities and constitutional provisions submitted in support of this motion will be supplemented together with a response to the Defendants' Motion for Summary Judgment and Suggestion of Mootness to be submitted on or before December 15, 1968 in accordance with paragraph 3 of the Court's order in this cause of October 21, 1968.

Dated at Juneau, Alaska, this 21st day of November, 1968.

Allen, DeGarmo & Leedy,
Seth W. Morrison
Faulkner, Banfield, Boochever & Doogan

By /s/ Avrum M. Gross
Avrum M. Gross

Copy received

November ....., 1968.

.....

of Attorneys for Defendants

State of Alaska
Walter J. Hickel, Governor
Department of Law
Office of the Attorney General
Pouch K, State Capitol—Juneau 99801

February 9, 1968

Honorable Urban C. Nelson, Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: 1968 Commercial Fishing Regulation
Section 102.09 and 104.09

Dear Commissioner Nelson:

We have most carefully and conscientiously examined and reexamined Sections 102.09 and 104.09 of the proposed 1968 Commercial Fishing Regulations in a sincere effort to find a sound legal basis on which to support their validity. We made this special effort because we were mindful of the many days and hours expended by the Board of Fish and Game and by your Department in hearings, deliberations, consultations, and research as well as preparation and drafting for the purpose of arriving at a set of salmon fishery gear limitations which would be sufficient to cope with the tremendous problems involved in protecting the species and avoiding the disastrous economic cycles, particularly in the Bristol Bay area, which recurringly threaten the industry.

We are most hesitant to invalidate the product of so much hard, conscientious and sincere labor of so many devoted public servants. Nevertheless, we are charged by law with the duty of examining these reg-

ulations for their legal validity and moreover will be called upon to defend them against attack in the courts which may be confidently expected to materialize in the fact of such significant xercise of the state police power.

We have reluctantly come to the conclusion that we cannot sustain the validity of these regulations as presently proposed for the following reasons:

1. With respect to Section 104.09, governing Salmon Registration Area T, we do not believe that the point-credit system for 1968 or its continuation for years subsequent to 1968, as set forth in subsections (a) and (b) of the cited section, can be sustained because, instead of being based upon a broad historical period and all available statistical records, it arbitrarily selects the 1967 season as the only qualifying test. Moreover, we feel that elimination of all other pertinent tests of qualification and concentration of prior registration during the 1967 Bristol Bay fishing season is so narrow as to invite a finding that it is arbitrary because it is lacking in reasonable classification and because there is no rational connection between the biological, social and economic factors underlying the Bristol Bay fisheries emergency and the remedy adopted by the regulation.

In fact, Section 102.09 suffers from the same type of deficiency since only those who obtained year licenses in 1966 or 1968 are allowed to fish in the remaining salmon registration areas of the state.

A statute containing provisions similar to Section 102.09 of the proposed regulations was challenged in the case of *State ex rel. Bacich v. Huse,* 59 P.2d 1101

(Wash., 1936). The statute permitted only those persons who had held salmon gill net licenses in 1931 or 1932 to purchase salmon gill net licenses in 1933. No provisions for new entrants was embodied in the statute.

The Washington Supreme Court held that the statute violated the Fourteenth Amendment of the United States Constitution for two reasons. 1) it set up a special privilege in a few people without justifiable reason for the selection of the privileged few (discussed more fully below), and 2) the choice of the base years was "not predicated on any fair, just or natural basis of selection, but [was] wholly arbitrary and capricious." The court stated:

> The classification made by section 4 of the [Washington] act in question can have no natural, reasonable or just relation to the subject matter of the act. If conservation be the end sought, it is not promoted by selecting a particular class of persons on an arbitrary basis and conferring special privileges on them and denying the same privileges to others. Concededly, regulations might be prescribed which would tend to accomplish the desired result. But such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state. The selection rests upon mere accident or circumstance, and not upon conditions effecting a natural line of cleavage. We are of

> the opinion, and hold, that section 4 of the act . . . is unconstitutional and void. (*Supra* at 1105)

In another case, *Rabin v. Connor,* 174 So.2d 721 (Fla., 1965), a serious economic problem in the celery industry of Florida had prompted the legislature to conduct an extensive study of the industry. As a result of the legislative findings an act was passed and regulations were promulgated which made the amount a celery producer could sell depend upon the amount he had sold in two past celery seasons. Provision was even made for issuance of a very small number of temporary certificates to producers who had not grown celery in the two designated seasons.

The Supreme Court of Florida held that the statute and regulations violated the Fourteenth Amendment to the U.S. Constitution. The Court said:

> In determining the validity of legislation and orders of the kind involved here, the vital factor to be considered is the practical effect and impact thereof . . . The practical effect of this marketing order is to grant to the holders of the permanent base quantity certificates a virtual monopoly on the production and sale of celery, to deny others the right to participate at all.
>
> . . . It is inescapable that the effect of the marketing order is to draw an unjust and discriminatory distinction between those who were producers during the representative period and those who were not. Such a classification, for which we can find no justification in any legitimate public policy, amounts to an arbitrary exercise of the state's police power so as to constitute a taking of property without due process of law and denial of equal protection of the law. . . . (*Supra* at 725)

2. We believe that Sections 102.09 and 104.09 are also invalid because they do not provide for the licensing of new entrants, who must be admitted under any rational system of gear limitation in order to meet the constitutional requirements. The United States Constitutional requirements in this regard were discussed above in connection with the *Huse* and *Rabin* cases and will not be further expounded upon here. However, there are two Alaska constitutional provisions (in addition to the provisions which parallel the U.S. Constitution) which are also violated by these regulations.

Article 1, Section 15 of the Alaska Constitution provides in pertinent part:

> . . . No law making any irrevocable grant of special privileges or immunities shall be passed . . .

Similar provisions in other state constitutions have been held to mean that a state may not grant an exclusive right to fish to a person or a specific group of persons. 36A C.J.S. Fish Section 36, page 562. *State ex rel. Game Commission v. Red River Val. Co.*, 182 P.2d 421 (N.M., 1946).

However, perhaps the most pertinent provision of the Alaska Constitution is Article VIII, Section 15 which provides:

> No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State.

This provision was derived from Sec. 1 of the White Act of June 6, 1924, 43 Stat. 464, 48 U.S.C.A. Sec. 221 under which Alaska Fisheries were managed prior to statehood.

The constitutional framers were specific in noting that the phrase was adopted in the Constitution to implement the same goal as that achieved by the Federal statute. The Natural Resources Committee of the Constitutional Convention submitted the following commentary on Section 15 to the Convention:

> Section 15. *No exclusive right of fishery.* This section is intended to serve as a substitute for the provision prohibiting the several right of fisheries in the White Act. Instead of using the terminology of that act the *purposes sought by it are given expression* in a prohibition of exclusive right or special privileges of any person to the fisheries of the state. (Emphasis added.) "Commentary on Article on State Lands and Natural Resources," January 16, 1956, p. 9.

In interpreting the scope of the exclusive right of fisheries clause, therefore, it is relevant to examine the interpretation of the clause which existed at the time of the adoption of the State Constitution.

In *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949), the U.S. Supreme Court in interpreting the White Act stated:

> "Exclusive," as used in Section 1 (of the White Act) . . . forbids not only a grant to a single person or corporation but to any special group or number of people. . . . The White Act fishing preserves were not intended to favor a monopoly to a favored few. (*Supra* at 122)

In view of the interpretation previously provided the White Act it is our opinion that limiting the right to fish for salmon in the Bristol Bay area to those

who fished there in 1967 and limiting the right to fish in any other salmon registration area of the state to those who fished in 1966 and 1967 in effect grants those particular fishermen an exclusive right of fishery. Moreover, we do not believe that the hardship clauses in Sections 102.09 and 104.09 save them from the taint of exclusivity since the clauses are far too narrowly limited. This is especially true of the hardship clause of Section 104.09 since its applicability is contingent upon the number of 1967 fishermen who apply for a 1968 license.

3. In addition the general moratorium applicable to salmon fishery in all areas of the state (Section 102.09) cannot be sustained in view of the fact that the specific limitations imposed upon the issuance of salmon gear licenses in the Bristol Bay disaster area have been pegged to the highest number historically issued in that area. Had there been a drastic reduction in the total number of licenses to be authorized from that experienced in the past year or two, it could have been successfully argued that an overall moratorium was necessary to avoid a mass exodus of salmon fishermen from the Bristol Bay area, resulting in an overflow into other fishing areas of the State. In the absence of such economic and historical justification, we believe that Section 102.09 would be struck down as being in excess of the police power of the State and in violation of equal protection and due process clauses of the Federal and State Constitutions.

4. Finally it is our oipnion that the authority delegated the Board under A.S. 16.05.250 does not include the power to establish age limitations of the

type contained in Section 104.09. As stated in A.S. 44.62.020:

> . . . to be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

Let me again reiterate and stress the great reluctance with which we have reached the foregoing conclusions. We feel however, that to ignore our serious legal doubts and to permit these regulations to take effect only to find them immediately attacked in the courts and then perhaps set aside right at the beginning of the fishing season, would do a great disservice to all concerned.

We regret the delay in transmitting these observations and recommendations, which was occasioned by our great desire to explore every possible avenue which would avoid questioning the validity of these carefully considered regulations. We continue to stand ready to work with your department and with the Board in a continued effort to promulgate regulations or to recommend legislation which would solve these great problems within the legal framework of our Federal and State Constitutions and laws.

Sincerely yours,
Edgar Paul Boyko
Attorney General

EPB:mmm

cc Honorable Walter J. Hickel
Governor of Alaska
Chairman of the Board of Fish and Game
Members of the Board of Fish & Game
Secretary of State

PROPOSED REGULATION 109.09

STATEWIDE MORATORIUM

Proposal 15 (Adopted as amended)

1. A person who licensed gear in either 1966 or 1967 will be allowed to license gear for 1968.
2. Persons desiring to license gear in a given gear registration area shall be allowed to license as follows:
   a) Persons who licensed gear in that gear registration area during 1967.
   b) Persons who licensed gear in that gear registration during 1966.
   c) Hardship situations determined by the Commissioner.

   Recognizing that an excessive number of units of gear in some areas during recent years has contributed to serious economic conditions and has created critical problems in resource management because of potential excessive harvest during any open season, it is the purpose of this section to prevent a shift of gear from such emergency to other areas and thereby prevent these same critical conditions from arising elsewhere in the state.
3. Hardship is defined as the inability to license gear in an area during 1967 or some previous year due to circumstances beyond the control of the applicant, military service, sick-

ness, death of the head of household and other hardship conditions.

4. *Appeals:*

Any person denied gear license may appeal this determination by completing application Form FG-196 and filing the same with the Commissioner at Juneau, Alaska not later than May 1, 1968.

A hearing officer shall be appointed by the Commissioner of Fish and Game and a hearing shall be conducted at a convenient location selected by the Department from the area for which gear registration is sought by the appellant. The hearing shall be commenced not later than 20 days after receipt of Form FG-196. All parties directly interested shall be notified by mail at least 10 days prior to the hearing date.

Within 10 days after the hearing, the Commissioner of Fish and Game shall review the recommendations of the hearing officer, and shall render a decision thereon. He shall promptly advise all directly interested parties of his decision by mail.

PROPOSED REGULATION 104.09

POINT SYSTEM

Proposal 35 (Adopted as amended)

1. No more than 2,529 units of gear are authorized to be licensed to the Bristol Bay registration area during 1968.

2. Applicants wishing to license gear for the Bristol Bay registration area will be licensed on the basis of the applicant's point credit rating which will include factors of fishing experience, hardship, and commercial fishing violations.

[6] *3.* Ten (10) points are required to apply for a gear license in 1968.

Point credits will be given as follows:

[3] *4.* Ten (10) points if the applicant held a gear license registered to Bristol Bay during the year 1967.

[4] *5.* Ten (10) points for the year in which a section or district was closed to taking of salmon, the applicant having fished such closed section or district the previous year, provided that the applicant did not license and fish gear in another section or district during the year for which this ten (10) points is claimed.

[5] *6.* Ten (10) points for any applicant that held a gear license for Bristol Bay in 1967 and made application and received a gear license for Bristol Bay in 1968 or subsequent years.

Nothing contained herein should be construed to mean that any licensee must participate in the 1968 fishery in order to earn their points of credit.

7. Points will be deducted for each destructive fishing violation in Bristol Bay (fishing closed waters or during closed periods) on the part of the applicant after 1967 as follows:

   Five (5) points for each violation. These points to be accumulative.

8. The Commissioner may issue gear registrations on the basis of hardship, not to exceed the authorized units of gear allowed in (1) above. Hardship refers to circumstances beyond control of the applicant; military service, sickness, death of the head of household and other hardships. Allocations under this section will be based on the credit point system coupled with allowances for hardship.

9. New applicants will be allowed to license gear in Bristol Bay. Age limit for gear licensing to be 12 or over. Application may be made for any or all of 4 years prior to age limit. Five (5) points credit for each year applicant has held a commercial fisherman's license for Bristol Bay commencing January 1, 1968.

10. On or before March 1, 1968 the Department will make available a list of all persons

found eligible for registration of gear in Bristol Bay during 1968. This list shall include the qualified applicants having the highest point credit rating. Selections from persons having identical point credit will be by lot at a public drawing conducted in the area in the presence of persons affected.

11. *Appeals*

Any person denied gear registration by reason of his ranking in the point credit system may appeal this determination by completing application Form FG-196 and filing the same with the Commissioner at Juneau, Alaska not later than May 1 of that year.

A hearing officer shall be appointed by the Commissioner of Fish and Game and a hearing shall be conducted at a convenient location selected by the Department from the area for which gear registration is sought by the appellant. The hearing shall be commenced not later than 20 days after receipt of Form FG-196. All parties directly interested shall be notified by mail at least 10 days prior to the hearing date.

Within 10 days after the hearing, the Commissioner of Fish and Game shall review the recommendations of the hearing officer, and shall render a decision thereon. He shall promptly advise all directly interested parties of his decision by mail.

12. Persons desiring to make application for registration of gear in Bristol Bay may do so by submitting an application on a form provided by the Department on or before April 15 by mail to:

    Alaska Dept. of Fish & Game
    Subport Building
    Juneau, Alaska

13. Each and every section of this regulation shall be deemed to be severable from every other section and a decision affecting the constitutionality of one section shall not be deemed to affect any other.

February 16, 1968

The Honorable August F. Reetz
Commissioner
Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Re: Proposed Section 102.09 of the
1968 Commercial Fishing
Regulations

Dear Commissioner Reetz:

Pursuant to AS 44.62.060 our office has reviewed the above referenced regulation and have concluded that it is legally valid, clear in content and proper in form.

By copy of this letter we are also advising the Secretary of State of our belief that the notice of publication requirements of the Administrative Procedure Act have been complied with in promulgating said regulation even though the regulation was a product of two separate Board meetings, only one of which was designated in the public notice regarding said regulation.

Sincerely,

Edgard Paul Boyko
Attorney General
By G. Kent Edwards
Deputy Attorney General

EPB:GKE:rw

cc: Secretary of State

[Title of Court and Cause]

INTERROGATORIES PROPOUNDED TO THE DEFENDANTS

1. Specify the number of people with total lack of experience in the particular area in which they fished who were issued gear licenses and fished in those areas during each of the calendar years 1965, 1966 and 1967.

2. Give the names and addresses of each such person totally lacking in experience in the particular area.

3. State in detail what additional management problems were posed by the lack of experience of the individuals named in answer to Interrogatory No. 2. Give specific incidences pertaining to each such problem and explain why the problem was due to the total lack of experience of the licensee in the particular area.

4. List all violations of fishing regulations by salmon net gear licensees which were made the subject of formal complaints during each of the years 1963, 1964, 1965, 1966 and 1967, designating the name and address of the licensee involved, the particular charge involved, the disposition of the case and specifying whether the licensee was totally lacking in experience in the particular area.

5. Designate each accident of which you have knowledge involving substantial injury to persons or to property as a result of action or inaction on the

part of a gear licensee during each of the years 1963, 1964, 1965, 1966 and 1967, giving the following information:

a. The nature of the incident involved;

b. Description of the injuries to person or property involved;

c. The name of the gear licensee involved;

d. His last known address;

e. The place where the incident occurred;

f. Whether the gear licensee was totally lacking in experience in the particular area involved.

Dated at Juneau, Alaska, this January 2, 1969.

Faulkner, Banfield, Boochever & Doogan
By /s/ R. Boochever
of Attorneys for Plaintiffs

Copy received
January 2, 1969
Charles K. Cranston
of Attorneys for Defendants

[Title of Court and Cause]

DEFENDANTS' ANSWERS TO INTERROGATORIES

Answers of defendants to interrogatories served on them by plaintiff on January 2, 1969.

Interrogatory No. 1. The Alaska Department of Fish and Game has not compiled information from its files in sufficient detail to enable it to specify the number of people with total lack of experience in the particular area in which they fished who were issued gear licenses and fished in those areas during each of the calendar years 1965, 1966 and 1967. The Alaska Department of Fish and Game has on file commercial fishing license applications from 1960 to the present. During these years the average number of commercial fishing license applications number approximately 18,000 and the average number of commercial fishing gear license applications number approximately 10,000. To compile the information requested by plaintiffs' interrogatory would require several months effort by at least two people who would have to be hired to do the job.

Interrogatory No. 2. The Alaska Department of Fish and Game has not compiled information from its files in sufficient detail to enable it to give the names and addresses of persons totally lacking in experience in the particular area in which they fished in each of the calendar years 1965, 1966, and 1967. The reasons for the lack of such information are the same as given in the answer to Interrogatory No. 1.

Interrogatory No. 3. Interrogatory No. 3 requests an answer stating in detail what additional management problems were posed by the lack of experience

of the individuals named in the answer to Interrogatory No. 2. It further requests an answer giving specific incidences pertain to each such problem and explanation as to why the problem was caused by the total lack of experience of the licensee in the particular area. Since the Department of Fish and Game does not have available the names and addresses of of the persons described in Interrogatory No. 2, defendants are unable to supply the information requested. Defendants state further that there is no information readily available describing specific incidents wherein additional management problems were caused by licensees with a total lack of experience who fished a particular area.

Interrogatory No. 4. The Department of Fish and Game has not compiled sufficient information to enable it to answer the interrogatory. Interrogatory No. 4 requests an answer listing all violations of fishing regulations by salmon net gear licensees which were made the subject of formal complaints in each of the years 1963, 1964, 1965, 1966 and 1967. The interrogatory further requests that the name and address of the licensee involved, the charge involved, the disposition of the case and a statement as to whether the particular licensee involved was totally lacking in experience in the area involved. During each of the years noted there have been approximately 1,000 formal complaints filed. In addition there have been thousands of informal warnings issued. The complaints are filed alphabetically in the Department's files and to extract the information requested from those files would require the assigning of additional clerical help to do the work, and would require a period in excess of one week. In addition,

to furnish information as to whether the particular licensee who was the subject of a formal complaint was totally lacking in experience in the area in which he fished would require a compilation of information requested by Interrogatories 1 and 2. This the Department of Fish and Game has not done.

Interrogatory No. 5. The Alaska Department of Fish and Game has no information which would enable it to answer Interrogatory No. 5.

No defendant in the within action has additional knowledge which would enable it to answer any interrogatory in a manner different from the above.

Dated at Juneau, Alaska, this 17 day of January, 1969.

Augie Reetz
Commissioner of Fish and Game

State of Alaska
First Judicial District—ss.

Augie Reetz, being duly sworn, deposes and says that he resides at Juneau, Alaska; that he is one of the defendants herein and the Commissioner of Fish and Game for the State of Alaska; that he has read the foregoing answers to interrogatories and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

/s/ Augie Reetz

Subscribed and sworn to before me this 17th day of January, 1969.

(Seal)

/s/ Janet R. Taguchi,
Notary Public, State of Alaska.
My commission expires 6/7/71.

[Title of Court and Cause]

PLAINTIFFS' NOTICE OF RENEWAL OF MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs do hereby renew their Motion of July 9, 1968 for a preliminary injunction directing the issuance of Alaska salmon net gear licenses to Plaintiff applicants and others similarly situated for the 1969 season in those cases where the sole basis for refusal of such license applications is Chapter 186 of S.L.A. 1968 and supplemental regulations; or the Plaintiffs alternatively move for a preliminary injunction enjoining prosecution of said Plaintiffs and others similarly situated for failure to have such license if such failure is based solely on the application of Chapter 186 and supplemental regulations. This Motion is based upon the original and supplemental affidavits of Rudolph Plancich of May 25, 1968 and January 16, 1969, and the affidavit of R. Boochever of January 17, 1969, and the pleadings and briefs submitted for consideration at the hearing on the various motions before the above entitled Court on February 14, 1969.

The original Motion has heretofore been denied without prejudice by Order of August 30, 1968.

With the submission of the extensive briefs and argument on the procedural and substantive merits of the case noted for February 14, 1969, it appears appropriate in view of the approaching season to renew the request for temporary relief in the event

a final determination may not be made prior to April of 1969 when season preparation must be commenced.

Plaintiffs acquiesce in the Defendants' supplementing their other briefs herein by a response directly pertaining to this renewed motion, and will move for oral argument on the motion on February 14 by separate motion submitted herewith.

Dated this 17th day of January, 1969.

Allen, DeGarmo & Leedy
and Seth W. Morrison
Faulkner, Banfield, Boochever
& Doogan
By R. Boochever
/s/ R. Boochever
of Attorneys for Plaintiffs

[Title of Court and Cause]

SUPPLEMENTAL AFFIDAVIT OF RUDOLPH PLANCICH

State of Washington
County of King—ss.

Rudolph Plancich, being first duly sworn, on oath, deposes and says:

That he is one of the above named Plaintiffs and makes this affidavit supplementing his affidavit of May 25, 1968 heretofore filed in this cause and a copy of which is attached to and made a part of this affidavit.

That Affiant is still the owner of a purse seine fishing vessel representing an investment of approximately $45,000, and desires to obtain an Alaska Commercial Purse Seine Gear License for 1969 for use in the Southeastern Area, just as he desired and applied for such a license in 1968, which application was denied in 1968 by the Defendant, Augie Reetz, as more fully appears from the attached copy of the affidavit of May 25, 1968.

That unless Affiant can soon be reasonably assured of being eligible for a 1969 gear license, he will be unable to recruit a competent crew and to obtain the necessary financing to permit his fishing operations in the Southeastern Area of Alaska during 1969. That such deprivation for 1969 will cause a loss to Affiant of from $10,000 to $20,000, which loss will be repeated in future years if the present gear license restrictions are continued in substantially their present form.

That under both the restrictions of Chapter 186 of the Alaska Session Laws of 1968 and the 1969 Commercial Fishing Regulations Section 102.09, entitled "Salmon Net Gear Licenses", considered either in conjunction or separately, Affiant would not be eligible for a net gear license in Southeastern Alaska because he has never held a purse seine gear license in that area, and he has not been employed as a commercial fisherman for any three years in that area, although he has had many years of experience as a gill net and purse seine fisherman in other areas in and out of Alaska.

That Affiant does not have reason to expect that he could receive a license under the so-called "hardship" provisions of Section 102.09 (a) (2). That he intends to apply for a gear license for the Southeastern Alaska area under the 1969 Regulations but believes that this is a futile act.

Dated this 16th day of January, 1969.

/s/ Rudolph Plancich
Rudolph Plancich

Subscribed and sworn to before me this 16th day of January, 1969.

/s/ Seth W. Morrison
Notary Public in and for the State of Washington residing at Seattle.

[Title of Court and Cause]

AFFIDAVIT OF R. BOOCHEVER

State of Washington
County of King—ss.

R. Boochever, being first duly sworn, on oath, deposes and says:

Exhibit B attached to the Complaint in the subject case is an extract from the Commercial Fisheries Regulatory Proposals of January 2, 1969 as indicated on the attached copy of the cover sheet of the Regulatory Proposals. These proposals are to be considered for final adoption, amendment, or appeal by the Board of Fish and Game at a meeting at Juneau, Alaska, starting on February 8, 1969.

Dated this 17th day of January, 1969.

/s/ R. Boochever
R. Boochever

Subscribed and sworn to before me this 17th day of January 1969.

/s/ Seth W. Morrison
Notary Public in and for the State of Washington, residing at Seattle.

Alaska Board of Fish and Game
c/o Alaska Department of Fish and Game
Subport Building, Juneau, Alaska

Commercial Fisheries Regulatory Proposals
January 2, 1969

To Be Considered for Final Adoption, Amendment or Repeal by the Board of Fish and Game at a Meeting at Juneau, Alaska, Starting on February 8, 1969

Attached for your information are proposed changes in the Regulations for Commercial Fisheries which were adopted for further consideration by the Board of Fish and Game at a meeting in Anchorage from November 30 to December 19, 1969. These proposed changes will be considered for final adoption, amendment, or repeal by the Board of Fish and Game at public proceedings in the Auditorium of the Department of Fish and Game, Subport Building, Juneau, starting at 9 AM on February 8, 1969.

Most of the attached proposals contain a reference to an original proposal number. This refers to the number of a proposal contained in the Commercial Fisheries Regulatory Proposals distributed to the public in October, 1968. These proposals had been submitted to the Board by individuals, companies, associations or the staff of the Department in October, 1968, for consideration at the December, 1968 meeting.

Pursuant to the Administrative Procedure Act, public comment is invited on these proposed changes.

Comments must be submitted to the Board in writing, as there will not be an oral public hearing at the February, 1969 meeting. Written comments should refer to specific proposal numbers and must be received by the Board on or before February 1, 1969. Please mail your written comments to the Board at the following address:

Alaska Board of Fish and Game
c/o Alaska Department of Fish and Game
Subport Building
Juneau, Alaska 99801

Alaska Board of Fish and Game

Robert Moss, Chairman	Homer
Frank Cook, Vice Chairman	Anchorage
Glen DeSpain	Fairbanks
Don Harris	McGrath
Gordon Jensen	Petersburg
J. Ellsworth Jensen	Ketchikan
Ron Rettig	Anchorage
Harry A. Shawback	King Salmon
Don Smith	Kodiak
Mike Uttecht	Cold Bay

[Title of Court and Cause]

OPINION

Before: Walter Ely, Circuit Judge, and
Raymond E. Ulummer and James A. Von Der Heydt, District Judges.

Ely, Circuit Judge:

Plaintiffs are nonresidents of Alaska. The defendants are those authorities of the State of Alaska charged with the enforcement of Alaska regulations pertaining to fishing rights. The plaintiffs are experienced salmon fishermen, and each has pursued his occupation in certain, although not all, of the coastal waters of Alaska. Those waters are generally divided into twelve fishing regions. In 1968, Alaska adopted a certain statute under which fishing rights in the different regions were thereafter to be regulated by gear licensing requirements.[1] The word "gear," in its

[1]We set forth here the pertinent statute, chapter 186, S.L.A. 1968.

An Act

Relating to persons eligible to obtain gear licenses; and providing for an effective date.

Be it enacted by the legislature of the State of Alaska:

*Section 1. Legislative Findings. (a) The legislature finds that excessive entry into Alaska fishing areas has resulted in massive accumulations of salmon fishing gear with attendant ever-increasing difficulty in providing for sound conservation and management of the resource.

(b) The legislature further finds that the uninhibited issuance of gear licenses to anyone despite total lack of experience in the particular area has not only been the prime factor tending toward accumulation of excessive gear but also has posed additional management, enforcement, and public safety problems through the lack of familiarity with regulations, waters, and procedures peculiar to the individual area.

(c) In view of the findings in (a) and (b) of this section, it is considered necessary by the legislature to impose experience

pertinent meaning here, refers to the operating nets employed in the commercial harvesting of salmon. The statute undertook to confer upon the Board of Fish and Game the right to adopt additional regulations pursuant to the statute. The most recent of the regulations, those which are pertinent here, became

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requirements before issuance of salmon gear licenses to applicants.

*Sec. 2. As 16.05 is amended by adding a new section to read:

Sec. 16.05.536. Persons eligible for gear licenses. (a) Except in cases of extreme hardship as defined by the Board of Fish and Game, a salmon net gear license for a specific salmon registration area may be issued only to a person who

(1) has previously held a salmon net gear license for that specific salmon registration area; or

(2) has, for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(b) An applicant who claims that he is qualified for a gear license under (a)(2) of this section shall submit to the Department of Revenue

(1) an affidavit by the applicant stating that he purchased Alaska commercial fishing licenses for the required three years, and during those years, commercially fished in the specific salmon registration area; the specific years the applicant purchased commercial fishing licenses shall be named in the affidavit; and

(2) either affidavits from two persons holding currently valid gear licenses in the area where the applicant desires to fish stating that the applicant has fished the required time in that area, or for each of three years statements prepared by the applicant, subsequent to the effective date of this section, signed by employees of the Department of Fish and Game evidencing that the applicant did report in at a Department of Fish and Game office within the required area during the required three years.

(c) A person who makes a false statement in the affdavits required by (b)(1) and (2) of this section is guilty of a misdemeanor.

*Sec. 3. As 16.05.540 is amended to read:

Sec. 16.05.540. Limitation on issuance of fishing gear licenses. The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant and only for the area in which the applicant qualifies under

effective on February 12, 1969.[2] From an examination of the germane provisions of the statute quoted in the

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sec. 536 of this chapter. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

*Sec. 4. As 16.05.250 is amended by adding a new subsection to read:

(12) establish additional qualifications relating to the eligibility requirements for gear licenses.

*Sec. 5. This Act becomes effective on January 1, 1969, unless all or any part of sec. 102.09 of the 1968 Alaska Commercial Fishing Regulations is struck down by the courts, at which time this Act will become effective immediately.

Approved by governor: April 29, 1968

Actual effective date: January 1, 1969

[2]We quote here the relevant extract from the 1969 Commercial Fishing Regulations for the State of Alaska:

"Section 102.09 Salmon Net Gear Licenses.

(a) Persons eligible for salmon net gear licenses.

(1) Except in cases of extreme hardship as defined in Sec. 102.09(a)(2), a salmon net gear license for a specific salmon registration area may be issued only to a person who:

(A) has held in 1965 or subsequent years a salmon net gear license for that specific salmon registration area; or

(B) has, for any three years since January 1, 1960, held a commercial fishing license and while so licensed actively engaged in commercial fishing in that specific area.

(2) Exceptions for extreme hardship:
Upon approval by a Hardship Panel consisting of the Commissioner, the Deputy Commissioner for Commercial Fisheries, and the Director of the Commercial Fisheries Division of the Department of Fish and Game, a salmon net gear license shall be issued as follows:

(A) Serious injury, sickness, or death;
If the head of a household who held a 1968 Alaska salmon net gear license will be prevented from commercial fishing in 1969 because of serious injury, or sickness as certified by a physician, or death, a member of his family, or other individual selected by the

margin, it is apparent that none of the plaintiffs could qualify for a salmon net gear license to fish in some of the twelve regions. In fact, their applications for the 1968 fishing season were denied under regulations less restrictive than those most recently issued.

The plaintiffs have argued that the licensing requirements are invalid as violative of both the Constitutions of the United States and the State of Alaska. There is no jurisdictional problem with the amount in controversy, and in light of the substantial federal question, our jurisdiction is initially founded on 28 U.S.C. § 1331(a). Since plaintiffs seek a declaration of the unconstitutionality of state laws and an injunction against their enforcement, our three-judge District Court was convened pursuant to 28 U.S.C. §§ 2281, 2284. On February 14, 1919, we conducted a hearing on the defendants' motion to dismiss and motion for summary judgment and the plaintiffs' motions for injunctive relief and for summary judgment. We took the cause under advisement, and our review of the authorities has convinced us that we must deny the defendants' motions and enter summary judgment in favor of the plaintiffs. Our reasons follow.

In their motion to dismiss, the defendants suggested that there is no case or controversy because the issues

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family, shall be issued a 1969 salmon net gear license for the same registration area.

(B) Other cases of extreme hardship, including new fisheries, certain military service situations and prolonged illnesses as approved by the Hardship Panel.

A new fishery is a fishery that has developed in a new location where eligible fishermen are insufficient to adequately harvest the resource."

are moot. This contention is valid in its application to the plaintiffs' original complaint which challenged the now-expired 1968 regulations under which they were denied licenses for that season. The plaintiffs' amended complaint, however, deals squarely with the 1969 regulations and statute now in effect and under which they would clearly be prevented from obtaining the gear licenses necessary for utilizing their salmon-catching equipment in certain coastal regions that they desire. Another three-judge court of this District overruled a similar suggestion of mootness and explained its reasoning at length in *Brown v. Anderson,* 202 F. Supp. 96 (D. Alaska 1962).

The defendants also urge that we abstain from consideration of the issues in light of the questions of state law involved in the case. It is perfectly clear to us that the plaintiffs should not be penalized by our adopting the position that we should abstain from meeting the important constitutional issues presented until the Alaska state courts may at some future time be called upon to analyze the questions. Our abstention would surely deprive the plaintiffs of substantial engagement in their occupation during this year's forthcoming fishing season. This prospective injury to their economic livelihood looms too grave and irreparable to permit delay in the adjudication of their constitutional rights. Moreover, the legal issues presented do not constitute a proper case for application of the doctrine of abstention. The proper disposition of the case on the merits is too clear, and we have absolutely no doubt that, if the question had

been presented to an Alaska court, it would have shared our conviction that the challenged gear licensing scheme is not supportable. See the analysis of authorities in *Zwicker v. Koota,* 389 U.S. 241, 250-51, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). In *Zwickler,* the Supreme Court stated, "We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction." [Citations omitted.] 389 U.S. at 251, note 14.

As we interpret the licensing scheme, it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The only persons that can presently qualify for net-gear licenses are those already vested with the local privilege. To receive a license for a particular fishery, one must have held a gear license in the same region in a year since 1965 or have held a commercial fishing license in that region for any three years since 1960.[3] An aspiring commercial licensee wishing to participate in salmon fishing may work for a locally licensed employer for three years or may fish for himself but without the necessary net-gear to catch salmon. Thus, if an outsider wishes to fish for salmon in a given year, and in three years to qualify for his

[3]Commercial Fishing Regulations, section 102.09(a)(1) (A), (B)(1969), note 2, *supra.* No other entries into the salmon fishing industry in any coastal region are permitted except the narrowly prescribed class of extreme hardship cases as limited in section 102.09(a)(2)(1969), also quoted in note 2, *supra.* Under this "hardship" provision, a licensee would be empowered to assign his license to anyone, regardless of whether or not the assignee had any fishing experience whatsoever.

own gear license, his chances are wholly dependent upon obtaining employment under a member of that closed class of fishermen who, in the specified past years, possessed the right to fish in the area. Although a state may enact fishing regulations in the legitimate interests of conservation and safety, it may not, to achieve those ends, employ arbitrary and irrational means which create or protect local, monopolistic interests. Under the scheme, entry into the salmon fishing industry is controlled not by the state, but by local fishermen in each area who are eligible for gear licenses and can choose among the commercial fishermen, if any, that they might wish to hire. The power to permit competition cannot be vested in *private* interests whose own benefit would ordinarily not be served by assisting potential competitors to qualify.

We are convinced that the Alaska scheme cannot meet the equal protection requirements set forth in *Morey v. Doud,*[4] wherein the Supreme Court struck down another invidious classification in legislation concerning economic regulation. There, the Supreme Court announced:

> "In determining the constitutionality of the Act's application . . . we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:
>
> '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police

[4]354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957).

> laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.
>
> "To these rules we add the caution that 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" [Citations omitted.]

354 U.S. at 463-64, citing other controlling authorities; see *Mayhue v. City of Plantation*, 375 F. 2d 447, 450-51 (5th Cir. 1967); *cf. Levy v. Louisiana*, 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968). We can reasonably conceive of no hypothetical state of facts which would justify discrimination in favor of salmon fishers who happened to have held commercial licenses in three years since 1960 or gear licenses in a year since 1965. The defendants suggest that prior experience might be necessary in the interests of safety and conservation management; nevertheless,

we perceive no rational basis for the state's placing of selection of the outsiders allowed to gain the necessary "prior experience" in the industry in the hands of private citizens now eligible for the required license. The defendants suggest that the necessary experience may be gained by an outsider if he fishes commercially in the area for three years, even though such fishing is not with the net-gear necessary to catch salmon. We cannot understand how the "experience" necessary to fish for salmon might be promoted by requiring the plaintiffs, who are experienced in salmon fishing, or others with no such experience to employ the different techniques incident to fishing for herring or other forms of non-salmon sea life.

Although we would have preferred that the Alaska courts should have had the first opportunity to so hold, we must also now declare that the licensing scheme violates the Alaska Constitution, which, in its Article VIII, provides:

> "Section 3. *Common Use.* Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.
>
> "Section 15. *No Exclusive Right of Fishery.* No exclusive right or special privilege of fishery shall be created or authorized in the natural water of the State."

The Attorney General of Alaska, in an Opinion directed to the Commissioner of the Department of Fish and Game, dated February 9, 1968, emphasized the unconstitutionality of a proposed and essentially similar licensing requirement which would have restricted area licenses to those license-holders within the same

area in the past two years. The Attorney General relied on *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936), in which 1933 salmon gear licenses were issued only to those who had held licenses in 1931 or 1932. He set forth the legislative history of section 15, *supra,* demonstrating that the provision was based on section 1 of the White Act of June 6, 1924, 43 Stat. 464, under which Alaska fisheries were regulated prior to Alaska's statehood. The leading case considering the White Act is *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 69 S. Ct. 968, 93 L. Ed. 1231 (1949). The Secretary of the Interior had ordered certain Alaska waters closed to fishing by all except those of the Karluk Indian Reservation and their licensees. The Supreme Court in *Hynes* held that the White Act prohibited fishing grants to special groups or numbers of people. We read, at 120-22:

> "Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves. . . .
>
> "For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted. . . . [W]e are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character. . . .
>
> "We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights."

The Attorney General of Alaska also ruled that the Board of Fish and Game could not be given the delegated authority, in the absence of guiding standards prescribed by other provisions of law, to specify certain prior years as the test for whether salmon gear licenses would be issued. Here, the Board has set specific years in the 1960's, although no guidelines are included in the 1969 statutory scheme. In this connection, it is pertinent to note that the Attorney General's Opinion was explicitly made applicable to section 102.09, the forerunner of the section 102.9 regulations set out in footnote 2, *supra*.

The Alaska legislature apparently attempted to avoid the impact of Attorney General Boyko's Opinion by ostensibly providing an avenue by which a commercial licensee might, after three years with such an area license, obtain a salmon gear license in the particular area. The fact that he might do so, even though he could never, without the aid of an established net-gear licensee, have previously gained experience in the area with gear essential to commercial salmon fishing does not harmonize with the defendants' argument that the challenged scheme is designed to promote safe operations by experienced fishermen. It appears to us that the "escape" avenue offers nothing beyond an illusory hope to non-established salmon fishermen seeking to ply their trade in a new area.

There is no saving difference between the present licensing scheme and that to which the Attorney General directed his objection. Both would tend to establish monopolistic trade guilds not thought desirable

by the framers of Alaska's Constitution. As a properly constituted three-judge court, we have jurisdiction to consider all legal attacks upon the statute. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80-81, 80 S. Ct. 568, 4 L. Ed. 2d 568 (1960). We therefore conclude that the 1969 salmon net-gear licensing statute and its consequent regulations cannot survive the requirements of the equal protection clause of the Constitution of the United States or those of the Constitution of Alaska.

In oral argument the defendants argued that summary judgment for the plaintiffs would be improper because the decision of the court might rest upon facts to be proved in plenary proceedings. Pressed for a definition of such anticipated proof, defendants' counsel was unable to specify, with any reasonable precision, any genuine issue of fact. Moreover, any genuine issue of fact, the resolution of which might control the disposition of the controversy, is required by Rule 5(H)(2)[5] of this court to be disclosed by written statement not later than three days prior to the hearing on a motion for summary judgment. The defendants did not, within the time allowed by this rule, or ever, file the required statement. This corroborates our conclusion that no genuine disputed issue of fact remains. Counsel did orally suggest that the

[5]This rule, as amended March 1, 1967, reads as follows:

"(2) Any party opposing the motion [for summary judgment] shall, not later than three (3) days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

defendants might offer proof that
erations of conservation inspired th
challenged regulatory scheme. Such
it might be, could not alter the
worthy or desirable may have beer
hind the legislation, they cannot cur
stitutional infirmities.

Accordingly, we deny the defen
dismiss and for summary judgmer
plaintiffs' motion for summary ju
forcement of the 1969 statute and
question is permamently enjoined.
will prepare and submit a propos
ment.[6]

Dated this 26th day of February

/s/ Walter Ely
United States C
/s/ Raymond E
United States D
/s/ James A. v
United States D

Certified to be a true and correc
filed in my office. Dated 2-26-69.

(Seal) J. M. Kroninger, Cl
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District of Ala

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sed form of judg-

y, 1969.

Circuit Judge
E. Plummer
District Judge
von der Heydt
District Judge

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lerk.
Filed Feb. 26, 1969,
District Court,
aska.

[6]Findings of fact and conclusions of law
a disposition is made, such as here, by
Fed. R. Civ. P. 52(a). Our opinion recite
and legal considerations which bear upo
we have been impelled.

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[Title of Court and Cause]

DECREE

This matter having come on for hearing before the undersigned judges duly convened pursuant to 28 USCA § 2281, et seq., on February 14, 1969, on defendants' motion to dismiss and motion for summary judgment and the claimants' motions for injunctive relief and for summary judgment, and the plaintiffs appearing through Robert Boochever of Faulkner, Banfield, Bootchever & Doogan and Seth W. Morrison of Allen, DeGarmo & Leedy, and the defendants appearing through G. Kent Edwards, Attorney General of the State of Alaska, by Charles Cranston, Assistant Attorney General, and briefs and affidavits having been submitted and the court having heard argument of counsel and having entered its opinion dated February 26, 1969, and good cause having been shown,

It Is Ordered, Adjudged and Decreed as follows:

1. Defendants' motion to dismiss and motion for summary judgment be, and the same are, denied;

2. Plaintiffs' motion for summary judgment be, and the same is, hereby granted;

3. Chapter 186 Session Laws of Alaska, 1968, and Section 102.09 of the 1969 Alaska Commercial Fishing Regulations are hereby declared to be unconstitutional under the provisions of the United States Constitution and the Constitution of the State of Alaska;

4. Defendants, their successors in office and all persons acting as their agents, officers and servants or

under their direction or authority, be, and they are, permanently enjoined and restrained from taking any action to place into effect, continue in effect or otherwise invoke or enforce Part 102.09 of the Alaska Salmon Commercial Fishing Regulations and the aforesaid Chapter 186 of the Session Laws of Alaska of 1968, and from denying fishing gear licenses by reason of the authority thereof.

Dated this 20th day of March, 1968.

/s/ Walter Ely
United States Circuit Judge
/s/ Raymond E. Plummer
United States District Judge
/s/ James A. von der Heydt
United States District Judge

Copy received
March 5, 1969
and approved as to form.
Charles K. Cranston
Assistant Attorney General
of Attorneys for Defendants.

ADDITIONAL SELECTED ALASKA COMMERCIAL FISHING STATUTES AND REGULATIONS

Alaska Statutes

Sec. 16.05.480. *Commercial Fishing License.* (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $10 for residents, and $30 for non-residents. All commercial fishing licenses are non-transferable and shall be retained in the possession of the licensee, readily accessible for inspection at all times.

Sec. 16.05.540. *Limitation on issuance of fishing gear licenses.* The fishing gear licenses mentioned in secs. 550-650 of this chapter shall be issued one to the applicant. Each applicant shall personally operate or assist in the operation of the licensed fishing gear. Each applicant for the fishing gear licenses mentioned in secs. 570 and 580 of this chapter shall also personally own or lease the licensed fishing gear. The license is transferable as provided under sec. 670 of this chapter.

Sec. 16.05.670. *Fishing gear license in general.* (a) A fishing gear license issued under secs. 550, 560, and 590-650 of this chapter may be transferred only if sickness, injury, death, unavailability or other incapacitation of the licensee keep or may keep a commercial fishing vessel in port because of the lack of other licensed fishing gear to take its place. A fishing gear license issued under secs. 570 and 580 of this chapter may be transferred only if sickness, injury, or death of the licensee keep or may keep a commercial fishing

vessel in port because of the lack of other licensed fishing gear to take its place. . . . (e) It is unlawful for gear which is licensed as provided in this chapter to be operated or caused to be operated by a person other than the licensee or the person to whom the license was transferred upon notice to the department.

Alaska Administrative Code

5 AAC 39.110. Commercial Fishing Licenses and Registration.

(a) All commercial fishermen shall have their commercial fishing licenses before fishing in any waters of Alaska.

(b) Not more than one commercial fishing license may be obtained by a person during any one calendar year.

(c) The following provisions apply to salmon net fishermen:

(1) Each salmon net fisherman shall be properly licensed, and registered in the registration area of the fisherman's choice as set out in sec. 120(d)(1) of this chapter.

(2) The license shall be valid for salmon net fishing only in the area that appears on the license.

(3) Upon request, the commissioner shall permit the license to be transferred to another registration area if the fisherman does not hold a salmon net gear license in either area and such transfer will not jeopardize proper conservation.

5 AAC 39.120. Licenses and Registration of Fishing Vessels and Gear.

(a) No person may operate a vessel and gear to take fish in an area of intended operation unless the vessel and gear have been registered with the local representative of the department. Registration, with the exception of salmon net and king crab fishing, may be done any time to commencing fishing. This does not apply to halibut fishing.

(b) Salmon fishing net and vessel license and registration requirements are as follows:

(1) No person may operate a net, and vessel used to take salmon with such net, unless the net and vessel are properly licensed and registered not later than April 15 of the year of operation for the registration area selected, except in the Arctic-Yukon-Kuskokwim area where the registration date shall be June 1 for the Yukon district. In the remainder of the Arctic-Yukon-Kuskokwim area, registration shall be at any time before commercial fishing.

(2) Registered nets and vessels shall be used to take salmon only in the one area for which they are registered.

(3) The late registration, or the transfer of registered nets or vessels to another registration area shall be permitted by the commissioner only in the case of serious injury, sickness or death, or loss of vessel by sinking, destruction or extensive mechanical breakdown.

. . .

(d) Each registration area shall be assigned a code letter. The registration areas are described as follows:

(1) Salmon registration areas are:

Code Letter — Area

A — Southeastern Alaska area

D — Yakutat area

E — Prince William Sound area, Copper River-Bering River area and the Yakataga district of the Yakutat area

K — Kodiak area

L — Chignik area

M — Alaska Peninsula area and Aleutian Islands area

T — Bristol Bay area, and after August 1 and before June 15, the Cinder River, Port Heiden and Ilnik sections of the Northern district of the Alaska Peninsula area

W — Kuskokwim district of the Arctic-Yukon-Kuskokwim area

X — Kotzebue district of the Arctic-Yukon-Kuskokwim area.

Y — Yukon district of the Arctic-Yukon-Kuskokwim area

Z — Norton Sound district of the Arctic-Yukon-Kuskokwim area.

Supreme Court of the United States

No. 185 ---, *October Term, 19* 69

Augie Reetz, Commissioner of Fish and Game for Alaska, et al.,

Appellants,

v.

John Bosanich et al.

APPEAL from the United States District Court for the District of Alaska.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar. This case is set for oral argument with No. 301 in which jurisdiction was noted today.

October 13, 1969